Transport America, Inc. *and* Paul Helsley. Case 25–CA–23179

February 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On November 3, 1995, Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel filed limited exceptions, a brief in support of the judge's decision, and a motion to correct typographical errors.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the limited exceptions and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Transport America, Inc., Shirley, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Remove from its files any reference to the discharge of Paul Helsley and notify him in writing that this has been done and that the discharge will not be used against him in any way.''

2. Substitute the attached notice for that of the administrative law judge.

[1] In the third paragraph of his decision, the judge inadvertently stated that Paul Helsley, the charging party, participated in protected concerted activities on ''August 12'' rather than ''January 12,'' which is the correct date. In the last sentence of the last paragraph of the portion of his decision entitled ''The Termination of Employment,'' the judge erroneously referred to ''Spegal's'' conduct in connection with the purported profanity attributed to Helsley. It is clear from the context of this portion of the judge's decision that the correct reference is to Paul Helsley's conduct. We also hereby modify Conclusion of Law 3 to reflect the judge's 8(a)(3) findings.

[2] We shall modify the judge's recommended Order to correct an inadvertent error in par. 2(b) by adding the standard expunction provision that the Board includes in cases of unlawful discipline. See *Sterling Sugars*, 261 NLRB 472 (1982). We shall also substitute a new notice so that it conforms to the Order as modified.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with closure of our operations because of their support for Teamsters Local Union No. 135.

WE WILL NOT discharge our employees because of their concerted activities protected by the National Labor Relations Act, or because of their sympathies for and activities on behalf of Teamsters Local Union No. 135 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to our employee, Paul Helsley, whom we unlawfully discharged on January 13, 1994, immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings suffered as a result of our unlawful conduct, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharge of Paul Helsley, and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

TRANSPORT AMERICA, INC.

Steve Robles, Esq., for the General Counsel.
James H. Hanson, Esq., of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE AND ISSUES RAISED

THOMAS R. WILKS, Administrative Law Judge. The unfair labor practice charge in this case was filed by Paul Helsley, an individual, against Transport America Inc., the Respondent, on April 28, 1994. After investigation of that charge, the Regional Director issued a complaint against the Respondent on June 24, 1994. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by the discharge of Paul Helsley on January 13, 1994, because he had, or Respondent suspected that he had, joined, supported, and/or assisted Chauffeurs, Teamsters, Warehousemen and Helpers

Local Union No. 135, a/w International Brotherhood of Teamsters, AFL–CIO, the Union, and also because he had engaged in concerted activities protected by the Act. The complaint, but not the original charge, also alleges that Respondent's supervisory agent, dispatcher William Spegal, in November or December 1993, threatened its employees with plant closure because they had engaged in union or other concerted activities protected by the Act. Respondent's timely filed answer, as amended at trial, and its position, as explicated at trial, admits the relevant jurisdictional, agency, and supervisory allegations but Respondent denies the commission of any unfair labor practice, denies awareness of any union activity by any of its employees in late 1993 or early 1994 and asserts that Paul Helsley voluntarily terminated his employment on January 12, 1994, at the end of a quarterly safety meeting held between it and its drivers. The Respondent asserts that it concluded that day shift driver Helsley intended to quit because of the manner in which he protested and profanely characterized Respondent's response to the complaints of several day shift drivers at the meeting regarding their perceived pay disadvantage as compared to the night-shift drivers. Respondent's position, as testified to by its chief operating manager, Daniel White, is that it had never formulated a decision to discharge Helsley because he had quit but, that had he not quit, Respondent would have ''very seriously considered'' discharging him.

The General Counsel takes the position that Helsley did not quit and that his conduct cannot reasonably be construed as effectuating a voluntary termination and, moreover, that credible evidence reveals that he was told he was discharged on January 13, 1994, the day after the safety meeting incident. The General Counsel argues that Respondent had engaged in an unlawful threat of closure during a futile union organizing campaign in 1991, of which Helsley's leading role was admittedly known by Respondent. An unfair labor practice charge involving the 1991 events resulted in a Board settlement agreement, a posted notice and a letter of apology to employees also posted by Respondent's own volition. The General Counsel did not seek to overturn that settlement, but rather he adduced evidence of the admitted 1991 threat of closure as background evidence.[1] Respondent admits the 1991 threat of closure but denies the 1994 allegation. Further, it argues that the threat allegation is barred by Section 10(b) of the Act as it was untimely raised in the complaint but not in the unfair labor practice charge.

The General Counsel also argues that Paul Helsley engaged in concerted protected activities on August 12 in the course of the concerted complaint of day shift drivers regarding their pay and that he did not lose that protection because of his language or his conduct and that Respondent also discharged him because of that protected activity which significantly occurred during the course of renewed union activity.

The foregoing issues were litigated before me at trial on August 24, 1995, at Indianapolis, Indiana, at which all parties were given full opportunity to examine witnesses and to introduce relevant documentary evidence. The parties declined to argue orally and instead filed posttrial written briefs on September 29, 1995.

On the entire record of this case, including my evaluation of witnesses' demeanor, I make the following findings.

I. JURISDICTION AND LABOR ORGANIZATION

Based on the admissions and the record evidence, I find that Respondent's business activities meet the required Board jurisdictional criteria and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Background

Since 1987, Respondent has been a corporation which operated out of a comparatively small four-room headquarters facility in Shirley, Indiana, from which it maintained a fleet of about 10 trucks driven by 20–25 drivers who pick up from refineries gasoline, fuel oil, and ethanol fuel which they deliver to retail gasoline stations by means of tractor-tanker trailer vehicles. Respondent maintains a 24-hour day, 7-day week operation which, because of a 4-day on and 4-day off scheduling for its drivers, in effect constitutes an 8-day week.

The owner and president is Phil White. The general manager is his brother, Daniel A. White. A third brother operates Gas America Co., Respondent's chief customer. The White family has operated predecessor and related businesses for many years. Some of Respondent's employees had been employed previously by various White family enterprises. Respondent's dispatcher, William (Bill) Spegal, had been employed by the White family for 25 years. Spegal dispatches the drivers during the day shift and partially into the night shift and is on call 24 hours a day. One of the drivers, Ron White, a witness for the General Counsel, is unrelated to Daniel White.

Jeffrey Helsley is Paul's brother and was in part responsible, with Paul's assistance, for the late 1991 organizing effort of the Union. Their 1991 activities were admittedly known to Respondent. Jeffrey Helsley was hired as a driver in April 1990 and discharged on January 20, 1992, allegedly because he negligently blew up an engine. Prior to January 13, 1994, he was the only driver to have ever been discharged by Respondent for any reason. As Daniel White testified, there is a historical, ongoing, extreme shortage of drivers, whom he characterizes were as hard to hire as ''pulling teeth.'' Rodney Helsley was hired in May 1988 and continues in the employ of Respondent as a driver. Upon the recommendation of his brother Rodney, Paul Helsley was hired by Spegal in November 1988 and worked as a night-shift driver for the entire period except for the 4 months preceding January 13, 1994. In December 1993, Paul Helsley caused a collision at Respondent's facility which resulted in the discharge of dangerously flammable materials from a tanker trailer. Although Daniel White considered Paul to have been responsible for what he called a ''terrible'' and ''dangerous'' accident, Paul Helsley was not discharged nor is there evidence he was formally reprimanded. Clearly, the need for drivers, whom Respondent admits were continually in demand and for which it was understaffed even through Janu-

[1] *Northern California District Council of Hodcarriers (Joseph's Landscaping Service)*, 154 NLRB 1384 (1965); *Copper State Rubber of Arizona, Inc*., 301 NLRB 138 (1991).

ary 1994, necessitated the retention of Paul Helsley despite his perceived culpability for that terrible accident which White claims endangered the life of Helsley's own brother. Apparently, the same tolerance level was extended to Jeffrey Helsley, at least until during 1992. It is his uncontradicted testimony that he engaged in a heated argument with Spegal wherein he caustically accused Spegal of failing to stand up for drivers who were being cheated out of holiday pay. Jeffrey Helsley, corroborated by Ron White and not effectively or convincingly contradicted, testified that he called Spegal a ''low life son of a b____'' to his face.

2. The 1991 union campaign

Jeffrey Helsley's and Paul Helsley's union organizing efforts in November and December 1991 were known to Respondent at the time, as admitted to by Spegal. The uncontradicted and/or admitted testimony indicates that in November 1991, Spegal told Paul Helsley that Daniel White told him that if the union effort was successful, he would close the doors and have his product hauled by a tanker operator located in Indianapolis. In December 1991, Spegal relayed the same threat to Jeffrey Helsley and told him that he was not worried about his own employment but feared for the drivers who would be fired, particularly one driver who was in poor health.

Spegal admitted making the foregoing threats of closure but denied that Daniel White actually made the remark quoted by him to the employees. He testified that he concocted the quotation because he was particularly irritated with Jeffrey Helsley's prounion statements, which he perceived were intended to agitate him.

As noted above, the 1991 union effort was aborted, and no election was held despite the fact that an election petition had been filed. Jeffrey Helsley's unfair labor practice charge regarding his January 1992 discharge was dismissed by the Regional Director.

3. The 1993 union organizing effort

Paul Helsley testified that in early November 1993, he, night driver Ron White, and day driver Rodney Helsley discussed mutual complaints about disparity of drivers' pay and lack of certain benefits and the need for union representation. Paul Helsley testified that he continued discussing the need for immediate action to obtain representation with drivers Bruce Bilbey, and Wayne Wagner, a substitute dispatcher and personal friend of Spegal but who is not alleged to be a supervisor. Helsley testified that he talked to the drivers after work in the headquarters parking lot, at the loading racks and wherever he ran into them, wherein he urged union representation on unspecified dates in November and December 1993. He is in part corroborated by Ron White and Rodney Helsley. Riggs testified as a General Counsel witness but could not recall hearing about such discussions. Wagner, a Respondent witness, denied being aware of any union activity since 1991.

As of the trial, Ron White, Rodney Helsley, and Riggs were current employees of Respondent who, under subpoena, were constrained, at risk to their own interests, to testify against their employer, and deference therefore must be made to their credibility. See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978). With respect to Rodney Helsley's blood relationship, that possible source of bias is counterbalanced by his testimony, corroborated by Spegal, that he had sought out advice from Spegal as to how to avoid testifying because he did not want to become involved and did not want to lose the $300 in pay that it cost him to be absent from work. Respondent had to dispatch a vehicle to retrieve Rodney Helsley from an area near Cleveland, Ohio, where he had been dispatched in order for him to comply with General Counsel's subpoena. His demeanor convinced me that he was a reluctant witness for the General Counsel. Similarly, Ron White and Riggs did not appear to be at ease as witnesses for the General Counsel. However, they all gave straightforward, convincing testimony. I found all to be credible witnesses.

Ron White testified that in late November and early December 1993, at the end of his shift, he engaged in a conversation with Spegal regarding the 1993 union organizing discussions among the employees. At first, Spegal testified: ''No, I don't remember unless it was back in 1991 [i.e., when he made a similar remark to Jeffrey Helsley].''

It was only after further prodding by Respondent Counsel that Spegal categorically denied the conversation. I found him to be less spontaneous and convincing than Ron White who was also a witness who had the least to gain by testifying. I credit Ron White and find that he was told by Spegal in that 1993 conversation in a gratuitous, unsolicited remark that if a union came in to represent the drivers, Respondent would close down and move to Indianapolis. To that remark, White responded to Spegal that he was not a union supporter. I conclude then that because of that threat, coming as it did without any reference to the Union in the conversation, Respondent was at least aware of a renewal of driver interest in representation by the Union in late November or early December 1993. There is no direct evidence that Respondent was directly aware or suspicious of who espoused such desire. Spegal admitted, however, his prior awareness of Paul Helsley's 1991 union organizing involvement.

Adding to the context of Paul Helsley's termination is David White's testimony that the day drivers had made to him ongoing complaints that they often received less monetarily rewarding assignments than the night drivers, many of whom were of lesser seniority. He explained that for a variety of reasons, day drivers, who, like night drivers, were paid a percentage of delivery receipts, did not earn as much as many night drivers; e.g., day time traffic, day time maintenance, wrecks, etc., caused lengthier and thus fewer deliveries for day drivers. Apparently, the explanation failed to satisfy the day drivers. It was one of the complaints that Paul Helsley testified that he discussed with other high seniority drivers in considering the need for union representation. Thus, in the fall of 1993, Respondent was aware of ongoing complaints of high seniority, day drivers about their pay; that high seniority, day driver Paul Helsley had been involved in the 1991 union effort; and that drivers were again discussing the need to obtain union representation in December 1993.

4. The quarter annual safety meetings

Respondent conducts quarter annual ''safety'' meetings with its drivers. The meetings are moderated by Daniel White who is assisted by Spegal. The purposes of the meetings are several. One purpose is the dissemination of information to drivers regarding the requirements of Respondent's

liability insurer, changes in delivery procedure requested by customers, and what Daniel White testified to was a ''barrage'' of governmental regulations he was forced to contend with on a daily basis. White in a resentful tone of voice and demeanor referred to the intrusiveness of governmental agencies, i.e., state inspectors who monitored the octane ratings of gasoline delivered by the tankers, the Federal regulatory agents who enforced the Environmental Protection Act (gasoline vapor emissions), the Federal Internal Revenue Service and the Department of Transportation. Although White did not explicitly refer to the Board, it, of course, must necessarily be included since at least 1991.

In advance of the meeting, a typewritten agenda is prepared and given to the drivers at the meeting. That agenda sets forth the same material which White orally conveys to the drivers at the meeting. The meetings up through January 1994 were held in what appears to be a small private banquet room at a nearby restaurant. The drivers are seated at rows of dining tables during the meeting. The meetings are held on nonwork time in the early evening. Drivers are not paid for attendance, which is not compulsory. They are provided, however, with a free meal after the meeting at the same tables where they sat throughout the meeting. Respondent has also maintained a practice of distributing some form of safety award at the January meeting for drivers who had maintained an accident-free and spill-free driving record for the preceding year. In January 1994, the awards were in the form of an article of clothing, i.e., jackets. The distribution of these jackets was the last agenda item at the January 12, 1994 meeting. Drivers who are absent from these meetings are provided with copies of the agenda and any verbal explanation on an individual basis.

There is some evidence that these meetings have not always consisted of a one-way informational process, but rather they involved input from and reaction of drivers to announced changes in delivery procedures that affected the circumstances of their employment. Thus dispatcher Spegal testified that at these meetings, drivers did indeed at times loudly ''get a point across'' which Respondent's managers attempted to answer.

5. The January 12, 1994 safety meeting and alleged concerted protected activity

The January 12, 1994 meeting took place at the customary restaurant at about 5:30 p.m. between shifts in a private banquet room accessible by two sliding doors, each at the end of one wall. About 15–17 drivers attended. Daniel White moderated. Spegal assisted. Also, part of the management team present were Safety Director Bruce Kiser; the manifest chief clerical, Maude Snider; and her assistant, Terri Neal. One of the items on the agenda was an upcoming IRS audit. It is undisputed that General Manager White told the drivers not to respond to any questions of the visiting IRS auditors but to refer them to management representatives for any information. Other items discussed were speed limits, the 24-hour use of headlights, the use of the vapor recovery system when loading and the proper preparation of forms.

The preponderance of credible and convincing testimony reveals that after the final agenda item was reached—distribution of jackets—and when White was near the end of distribution, several drivers addressed the subject of the day shift drivers' pay compensation.[2] The drivers are paid at a percentage of the charge per load delivered. The more loads delivered, the greater is the compensation. Manager White testified that there was a perennial complaint of day drivers that they were paid less than night drivers, many of whom are of lesser seniority. White testified that traffic conditions and other factors related to day shift operations cause a lengthier delivery time and thus fewer loads delivered than at night. Dispatcher Spegal admitted, however, that often a $25-commission load will take 1-hour delivery time whereas a $106 load may take 6 hours, perhaps because of road conditions in that delivery route.

Paul Helsley was present at the January 12 meeting during his nonworking hours. He sat with or near driver Ron White. Present also were drivers Rodney Helsley, Ronald Riggs, and Bruce Bilby. Much of what occurred regarding the concerted complaints as to the alleged disparity of pay between day and night-shift driver is undisputed. As Manager White was handing out the last of the jackets, Ron White was the first to ask why the disparity in pay continued despite the day drivers' greater seniority. Bilby and Rodney Helsley also demanded an explanation. Ron White and Paul Helsley testified that he did not join in at that point. As a Respondent witness, Manager White testified (without corroboration) that he responded to what he characterized as ''this group of drivers'' who complained about the pay disparity by telling them that night drivers will always earn more than day drivers, at which point he heard Paul Helsley say to probably no one in particular, ''Well, I think I'll just go back on nights then.'' Manager White also testified that he asked the complaining group if they had any ideas but that they had nothing to offer and ''All they did was complain.'' As a 611(c) witness, Manager White identified Paul Helsley as one of the group of complaining drivers. As a Respondent witness, dispatcher Spegal also identified Paul Helsley as one of the complaining drivers. Thus, despite the testimony of Paul Helsley that he did not as yet join in the protest, Respondent's management perceived him as having joined in with that group complaint.

After Manager White gave his initial reaction to the day drivers pay complaint, he turned to dispatcher Spegal and asked him to make a more specific response. Spegal then addressed the drivers and attempted to explain the nature of dispatching assignments. Bilby ignored him and complained that he was not being assigned sufficient high paying loads despite his second highest seniority ranking. Spegal testified that Bilby had several days earlier asked him to terminate his shift at 3 p.m. because he had to attend an Amway distributors' meeting. Spegal, without identifying Bilby by name, told the drivers that one driver, in effect, caused his own curtailment of loads by terminating his shift early to attend an Amway meeting. Spegal testified that some drivers, including Paul Helsley, began to ''mumble.'' Spegal testified that Paul Helsley also then complained about not earning as much

[2] Manager White first testified, as a 611(c) adverse witness, that he had only covered three-quarters of the agenda. Only Snider corroborated him. When called as a Respondent witness, White retracted his testimony to conform to everyone else's, including Spegal, thus leaving Snider, who purported to affect certitude in demeanor, as the only witness to testify that the agenda was incomplete.

money on the day shift as he had on nights. At that point, Spegal told the drivers, without identifying him by name,

> as an example here is a guy who is complaining about not making money but [who] told me he would take a load provided he could get in to watch the [televised] IU [Indiana University] basketball game [and] he wants to earn more money but the IU game is more important [to him].[3]

It is at this point that Respondent witnesses Manager White, Spegal, Kiser, Snider, and driver Harold Conley testified, in varying degrees of conviction, detail, spontaneity, and corroboration or lack of it that Paul Helsley jumped up, shoved, slid, slammed, pushed, or moved his chair back from the table, onto which he threw down his agenda copy, shouted, ''I don't have to take this f__cking bull sh__t,'' ripped open the door, slammed it, then almost ripped the door off its tracks or threw one of the doors off its track and ''stormed,'' marched, or walked quickly out of the meeting.[4]

Paul Helsley testified that when he first joined the conversation when Spegal referred to the IU basketball incident. He admitted that he became very upset and assumed Spegal was referring to him because of his well-known rabid IU loyalty and concluded that Spegal was unfairly trying to explain why all high seniority day drivers were paid less than night drivers because of an isolated, unrelated incident rather than to take responsibility for the way he dispatched loads. According to Helsley, his conduct was less physically abrupt, i.e., he neither slammed the chair, threw down papers, ''stormed'' nor ran out, nor ''ripped'' open the door. He admittedly suddenly arose and, according to him, stated: ''I don't have to listen to this bull sh__t [and as he went out the door] put me back on nights.''

It is also Helsley's testimony that at one point before he arose, he also stated to Spegal: ''Bill, that's bull sh__t. I'm losing between one and two hundred dollars on this on account of these loads.''

He is not explicitly contradicted as to this additional comment and, because of Spegal's and Dan White's recollection that Paul Helsley had at some prior point joined with the complaints, I credit Helsley that he also made the other ''bull sh__t'' remark as well and did explicitly make common cause with the other complaining drivers by disparaging Spegal's explanations to them. Spegal did not explicitly deny the ''put me on the night shift'' comment. Because of Manager White's admission that such remark regarding nightshift transfer was made albeit somewhat earlier, I credit Helsley, whom Riggs and Ron White corroborated, that he did make the night transfer remark to Spegal as he departed. Moreover, other Respondent witnesses did not deny and some admitted that they were not certain whether Paul Helsley had said other things as he departed, e.g., Conley admitted that he may have done so.

Although General Counsel witnesses Ron White, Rodney Helsley, and Riggs all corroborated Paul Helsley in that he did not use the ''f'' word, they are curiously inconsistent as to what he did say. Paul and Rodney Helsley admitted that Paul used the phrase ''I don't have to take this bull sh__t.'' Riggs and Ron White recalled that Paul Helsley's remark to Spegal was: ''Bill that's a bald faced lie. I don't have to take this. You can go ahead and put me on nights.''

Furthermore, Riggs and Ron White characterized Paul Helsley's departure as walking out, not ''storming,'' ''marching,'' or running. Ron White testified that Helsley neither threw down his papers nor did he yank the door off its track. I found Riggs to be a convincing, honest witness. He was subpoenaed to testify against his present employer. His testimony that he is personally friendly with Manager Dan White is uncontradicted. He failed to corroborate testimony regarding union activities, claiming he was aware of none. Riggs and Ron White had nothing to gain and much to jeopardize by testifying against Respondent. The drivers called by Respondent to testify were far less convincing. Conley's testimony had to be interrupted and nearly led by Respondent's counsel to elicit the ''f'' word recollection. He referred to Helsley as walking out but changed his testimony in cross-examination. He claimed to have heard what Helsley said because he was right behind him, but admitted: ''I didn't hear what he said real close. I wasn't listening to what he said real close, I guess.''

Driver Wagner, the substitute dispatcher and admitted personal friend of Spegal, testified that at first Helsley stated that he ''didn't have to take this crap.'' Like Conley, he had to be asked again by Respondent's counsel but answered ''yes'' that these were Helsley's ''exact words.'' Then finally, after being led by counsel, he recalled that the ''f'' word had been used.

Safety Director Kiser's testimony was so vague, fragmented, cryptic, and selective as to be patently unreliable. It was marked by an equally uncertain testimonial demeanor. Kiser gratuitously referred to his many years of employment by the White family, including employment by Daniel White's parents. His deferential tone of voice denoted a friendship and loyalty in that relationship. Chief clerical Snider gratuitously informed the court that she was ''stunned'' by Paul Helsley's abrupt chair-shoving, ''storming out,'' ''ripping'' open the door and ''slamming it,'' and his use of the ''f'' word. Though she claimed that she could hear clearly what was said, she testified that it ''seemed'' that Helsley was ''cussing'' as he went out the door, but she did not recall exactly what he said and did not ''believe'' that Helsley requested the nightshift transfer. She insisted that the agenda was only three-quarters covered. She testified in isolated, sole corroboration of Manager White's initial, but later retracted, testimony that the meeting continued to cover other agenda items. She did so with seeming conviction. Clearly, her recollection was either unreliable or contrived to coincide with Manager White's initial version. I have no confidence in this witness' testimony nor demeanor.[5]

6. The termination of employment

Manager White testified that he considered Paul Helsley's conduct on January 12 at the meeting to have been ''unacceptable, belligerent, aggressive, defiant'' and ''belittling to me,'' despite the fact that Helsley directed his remarks to

[3] Paul Helsley testified without contradiction that he had on only one occasion asked to terminate his shift early to view an IU basketball game.

[4] Manager White failed to refer to Helsley's use of the ''f'' word in his pretrial affidavit submitted to the Board's investigation.

[5] Snider's son also depends upon Respondent for employment, i.e., office cleaning.

Spegal in a verbal exchange between Spegal and Helsley which White admitted he did not join. Yet, White insisted that he considered himself to be personally insulted. He also insisted, however, that Helsley's comments and accompanying behavior clearly meant to him an intention expressed by Paul Helsley to quit his job. Therefore, White claims he never got to the point of deciding to discharge Helsley which, he testified, he probably otherwise would have done. Manager White testified that despite his tolerance of Paul Helsley's recent ''terrible'' and ''dangerous'' accident and despite the extreme shortage of drivers, he did not try to discourage Helsley from quitting because White felt embarrassed, upset, and hurt and testified, ''I can't have anybody *talk to me* that way.'' Manager White explained that the accident misbehavior was something that could be corrected but Paul Helsley's comments were considered by him to be a personal insult.

After Paul Helsley left the meeting, he went to his vehicle parked in the restaurant lot. Ron White followed and joined him shortly thereafter. Neither of them partook of the free meal provided by Respondent. After they left, but before the meal service, the other day drivers continued with comments about the alleged pay disparity. White testified, without contradiction except for Snider, that the day drivers pay confrontation arose just as Manager White approached Ron White to give him his safety jacket award, which was the last jacket distributed.

Manager White and dispatcher Spegal testified that they discussed Paul Helsley's conduct later on January 12 after the meeting at Respondent's facility and both concluded that he had quit. Neither of them had any doubt as to Helsley's intent and neither gave any thought of asking Helsley if his intent was otherwise. Spegal testified that the subject of discharge did not arise. Spegal testified that the next day at about 7 to 7:30 a.m., he arrived at his office and prepared a ''letter of resignation'' for Paul Helsley which he interpreted as being required by DOT rules. He also considered the need to retrieve certain door keys, station lock keys, and credit authorization cards from Helsley. Spegal testified that he tried to contact Helsley at his home by telephone but obtained a busy signal all that morning until he finally reached him at 10:30 a.m. Spegal testified that when he got Helsley on the line, he simply asked him to bring in his cards and keys and that Helsley said he would do so when his wife returned later in the afternoon with the only family vehicle, to which Spegal said, ''fine.'' According to Spegal, Helsley at that point stated that he had tape-recorded the meeting, to which Spegal told him that if he had, it would only hurt him and not the Respondent. Spegal testified Helsley said that he had telephoned various governmental agencies, including the Dot as well as Respondent's insurer, with some unspecified complaint. Spegal testified that he was already informed by the insurer and Dot that Spegal had made some report to them. Spegal testified that he interpreted Helsley's statements as an attempt ''to try and get us somehow.'' Spegal could not offer any explanation as to just what Helsley was seeking revenge for if he had in fact voluntarily quit his job. He admitted that he did not refer to Helsley's resignation during the telephone conversation. Spegal testified that that had been his last direct communication with Helsley inasmuch as later in the day, Helsley's wife came in to the office and dropped off the requested keys and cards. He had no conversation with her. He did not even tell her that he had prepared a ''resignation letter'' to give to her husband. Nor did he attempt to have it delivered by her nor did he mail it. Instead, he retained it unsigned.

What Spegal identified as a resignation letter was introduced into evidence as Respondent's Exhibit 2. Nothing about that document, either in form or substance, resembles a letter. Rather, the document is in fact a file memorandum entitled ''Driver's termination.'' It briefly summarizes Paul Helsley's comment at the January 12 meeting, Respondent's conclusion that such comment was taken by Respondent to be resignation and that Helsley was asked by telephone on January 13 at 11 a.m. to surrender his keys and cards. Significantly, it does not refer to the use of the ''f'' word; it fails to indicate that Helsley was ever told that his conduct was construed to be a resignation and finally states that Helsley, in the telephone conversation, did not say he had as yet telephoned governmental agencies but rather had threatened to do so. Further, the memorandum, contrary to Spegal's testimony, states that Helsley had refused to come in. With respect to the January 12 episode, it quotes Paul Helsley as saying: ''I don't have to take this bull sh__t.''

The document also contains the following inexplicable comment: ''It was not clear what he [Paul Helsley] was upset over.''

Spegal testified that as Helsley's wife departed the office, he looked out the window and saw Paul Helsley in his vehicle waiting for his wife. Spegal made no effort to either go out to speak to Helsley or to signal to him to wait. In cross-examination, in reference to Helsley's resort to governmental regulatory agencies, Spegal explained that his view was that employees who enjoy working at an employer do not call those agencies but rather report problems such as safety problems to the Respondent, e.g., a gasoline spill.

Even according to Spegal, not all persons universally concluded that Paul Helsley's uttered announcement that he did not intend to remain after the ending of an optional meeting to listen to the dispatcher's proffered response to a non-agenda concerted pay complaint, which he disparaged, constituted an announcement of resignation from employment. Spegal testified that in the morning of the January 13, after driver Riggs reported for his dispatch, he asked Spegal whether Helsley had been fired. Also, Spegal testified that he then received a telephone call from Rodney Helsley who told him that his brother Paul had not quit his job. To both, Spegal claimed that he simply responded that Respondent ''took it that he quit.'' Spegal thinks these calls were received before he talked to Paul Helsley at 10:30 a.m. Most probably, they did occur earlier during the morning dispatching time. Clearly, Spegal was put on notice that some basis for doubt as to Helsley's voluntary resignation existed. Yet, he made no attempt to clear it up when he later talked to Helsley or when he spoke to his wife.

I consider the testimony of Manager White and dispatcher Spegal as to their interpretation of Paul Helsley's postformal meeting, predinner departure as a resignation of employment to verge upon the absurd. Such a conclusion is logically insupportable and suspect, particularly in light of Spegal's inexplicable conduct and communications or lack thereof on January 13.

I credit the far more convincing and inherently more plausible testimony of Paul and Rodney Helsley. I find that on

the morning of January 13, Spegal did in fact have a telephone conversation with Rodney Helsley wherein Spegal stated that Paul Helsley had been discharged and that Rodney Helsley had better not do anything ''stupid'' to jeopardize his job. I find that on the morning of January 13, Spegal telephoned Paul Helsley at his home and ordered him to bring in his keys and cards and, when asked why, was explicitly told he was discharged because he ''walked out of the meeting.'' When Helsley asked if the other guy who walked out was also fired (i.e., Ron White), Spegal disclaimed awareness that anyone else had walked out.

Finally, because of the vulnerability of the credibility of Spegal and Manager White regarding the issue of the nature of Paul Helsley's termination and the weaknesses of their witnesses regarding the episode of January 12, as compared to the greater credibility of the General Counsel's witnesses described above, I credit Paul and Rodney Helsley's version of Paul's statement, i.e., he did not use the ''f'' word but he did disparage Spegal's justification for disparity of all day driver pay as ''bull sh__t'' and he did state a request to be transferred to the night shift, as essentially corroborated by Riggs and Ron Smith. I conclude that in this case Respondent has at different times advanced different shifting and false reasons for Paul Helsley's termination. On the morning of January 13, Helsley was told he was discharged because he walked out of the meeting. This is false. The meeting had ended as the agenda had been covered. Moreover, the meeting was optional even if he had walked out. Next, Respondent placed in its file a memorandum, the authenticity of which, because of Spegal's lack of credibility, is suspect, and which states that Respondent demanded Helsley's keys from him because it considered the fact that he jumped up and said ''I don't have to take this bull sh__t'' and storming out of a meeting that had already formally ended to have had the only possible interpretation as an act of resignation. Such a proffered position is utter foolishness. Moreover, there was no reference to any so-called profanity, i.e., the notorious ''f'' word. At trial, Helsley's conduct was further embellished so as to have been so dreadful that he would have been discharged had he not quit. Thus the ''f'' word was falsely attributed to Helsley's statement and Manager White allegedly became personally insulted. Yet, Paul Helsley did not in fact insult White. He disparaged Spegal's proffered response to a concerted work complaint. He did not even disparage Spegal as a person. Furthermore, the evidence of credible witnesses reveals that Respondent's workplace is not the exceptional genteel place suggested by Respondent. Rather, the usual vulgarity and profanity prevail, as occurs throughout the industrial world, even onto past disputes with Spegal himself. Further, it cannot be suggested that the private banquet room changes the circumstances. It was private. It had been the scene of past loud argumentation between management and drivers regarding work conditions. Thus, even had the ''f'' word been used, which it was not, Spegal's conduct, had it occurred as Respondent's portrayed, would not have been so shockingly deviant from past worker-dispatcher confrontations.

B. *Analysis*

Section 8(a)(1) of the Act sets forth that an employer commits an unfair labor practice when it interferes with an employee's right to engage in ''concerted activities for the purpose of mutual aid or protection.'' Respondent discharged Paul Helsley because of his conduct at the January 12 meeting as found above and, as argued by the General Counsel, because of his union organizing activities which formed the context for that January 12 conduct. Respondent argues that Helsley's conduct was individual in nature, i.e., his interest in his own pay and his pique over the IU basketball accusation. The facts demonstrate otherwise.

Paul Helsley in fact did join with other employees in a mutual complaint, i.e., disparity in pay. Moreover, whether or not he did or at what point he did so is irrelevant because he was perceived by Respondent's managers as having done so. It is clear, however, that even if he did make an individual complaint, it necessarily constituted a continuation of his and his coworkers' preceding complaints made at the meeting which, by its nature, constituted concerted protected activity. Compare *Consumer Power Co*., 282 NLRB 130, 131–132 (1986); see also *United Enviro Systems*, 301 NLRB 942 (1991), when employee complaints raised at an employer-conducted meeting constituted protected concerted activity. Even if Helsley had not explicitly joined the protest until he reacted to Spegal's IU accusation, that response constituted disparagement of Spegal's defense to concerted employee complaints. That conduct alone, despite Helsley's personal pique, constituted a joining of causes. Furthermore, it constituted at the very least an education of his coworkers as to a condition of employment, i.e., that drivers did not cause their own loss of earnings as claimed by Spegal. Mutual education as to wages or salaries constitutes protected activity. *Automatic Screw Products*, 306 NLRB 1072 (1992). As observed by the Board in *Triana Industries*, 245 NLRB 1258 (1979), such discussions as to pay may be necessary as a prerequisite to union activities and are construed to be protected activities. In this case, Helsley's conduct occurred in the midst of known union organizing activities and was most likely to have been perceived by Respondent as part of that effort. Viewed from another aspect, Helsley's castigation of Spegal's proffered response to the concerted employee pay complaint, even if done individually, may be construed as an espousal of the other employees' cause and thus is concerted protected activity. Compare: *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502 (8th Cir. 1993), citing *Meyers Industries*, 268 NLRB 493, 497 (1984).

Clearly, Paul Helsley was discharged for conduct that was part of the res gestae of protected activities, i.e., the allegedly disruptive way he responded to Spegal. In *Consumers Power Co*., the Board observed:

> . . . where an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service.

In *Health Care & Retirement Corp*., 306 NLRB 66, 65 (1992), citing, inter alia, *Consumers*, supra, the Board summarized the state of applicable law as follows:

> The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves. The Board and courts have

> found, nonetheless, that an employee's flagrant, opprobrious conduct, even though occurring during the course of Section 7 activity, may sometimes lose the protection of the Act and justify disciplinary action on the part of an employer. Not every impropriety, however, places the employee beyond the protection of the Act. For example, the Board and the courts have found foul language or epithets directed to a member of management insufficient to require forfeiting employees protection under Section 7. [Citations omitted.]

See also *United Enviro Systems*, supra, involving loud, profane, obscene, and angry complaints by employees at an employer-conducted meeting.

Finally, protection is not denied to an employee regardless of the inaccuracy or lack of merit of the employee's statements absent deliberate falsity or maliciousness, even when the accusatory language used is stinging and harsh. *Delta Health Center*, 310 NLRB 43 (1993).

If the General Counsel proves by a preponderance of evidence that concerted protected activity motivated even partially the discharge, the burden of proof applies as set forth in *Wright Line*, 251 NLRB 1083 (1980). The burden then shifts to Respondent to prove by a preponderance of evidence that it would have discharged the employees even in the absence of the protected activities. Respondent does not satisfy that burden merely by demonstrating the existence of a legitimate reason for discharge. *Health Care & Retirement Corp*., supra. I find that Respondent has failed to maintain that burden. Its proffered explanation as to the nature of Helsley's termination was shifting, inconsistent, and demonstrably false. Not only was there no precedent for such discipline, the credible evidence reveals a past toleration for profanity and obscenities, even during past episodes involving employee complaints. The difference in Paul Helsley's conduct is that it occurred within the res gestae of concerted protected activities which were necessarily visible as also part of the res gestae of renewed union organizing activities, of which Helsley had been identified with in the recent past and to which Respondent remained hostile, as evidenced by Spegal's threats and Manager White's aversion to perceived outside intrusion in the affairs of his business.

I therefore find that Respondent violated Section 8(a)(1) of the Act by its discharge of Paul Helsley because of his concerted protected activities of January 12, 1994. Furthermore, because of the shifting and false nature of Respondent's proffered explanations concerning Paul Helsley's termination, the timing of such termination in confluence with renewed union activities, of which he was recently associated, and the continuing animosity toward such activities, I must infer that Respondent was aware of Paul Helsley's continuing union activities or that it suspected as much and was therefore motivated to discharge him. Compare: *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966), which holds that a trier of fact may justifiably infer unlawful motivation when the proffered nondiscriminatory motivation is false even in absence of direct evidence of motivation. See also *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *Rain Ware, Inc*., 735 F.2d 1349, 1354 (7th Cir. 1984).

Moreover, even if Respondent did not have direct knowledge of Paul Helsley's particular 1993 union involvement, there is still a preponderance of evidence to mandate a conclusion that his discharge for protected concerted activities within the context of union activities was motivated, at least in part, as a general reaction to those union activities for which ongoing and rejected employee complaints formed a genesis. I therefore find that the General Counsel sustained his burden of proof with respect to the 8(a)(3) allegation of the complaint and that Respondent failed its burden as set forth in *Wright Line*, supra.

With respect to the late November and December 1993 threat by Spegal of retaliatory business closure, I find that such conduct clearly violated Section 8(a)(1) of the Act. I further conclude that such finding is not barred by Section 10(b) of the Act inasmuch as it was conduct closely related to and necessarily enmeshed in the litigation of allegations set forth in the original charge, i.e., the January 1994 discharge of Paul Helsley for which Respondent must necessarily have had to litigate as admissible evidence of animosity and knowledge of ongoing union activity. *Redd-1, Inc*., 290 NLRB 1115 (1988); *Nickels Bakery of Indiana*, 296 NLRB 927 (1989); *Beretta U.S.A. Corp*., 298 NLRB 232 (1990); *FPC Holdings, Inc*., 314 NLRB 1169 (1994).

CONCLUSIONS OF LAW

1. As found above, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, Respondent violated Section 8(a)(1) of the Act in late November or early December 1993 by threatening an employee with closure of its operations in retaliation for their support of Teamsters Local Union No. 135.

3. As found above, on January 13, 1994, Respondent discharged its driver Paul Helsley, in part because of his concerted protected activities on January 12, 1994, in violation of Section 8(a)(1) of the Act, and in part because of his actual or suspected support for Teamsters Local Union No. 135.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged its employee, Paul Helsley, on January 13, 1994, I recommend that Respondent be ordered to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings suffered as a result of its unlawful conduct by payment to him of a sum equal to that which he would have earned absent the discrimination against him, with backpay and interest computed in accordance with the formula set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I further recommend that Respondent expunge from its files its references to the termination of Paul Helsley in January 1994 as a voluntary termination.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Transport America, Inc., Shirley, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with closure of its operations because of their support for Teamsters Local Union No. 135.

(b) Discharging its employees because of their concerted activities protected by the National Labor Relations Act, or because of their sympathies for and activities on behalf of Teamsters Local Union No. 135 or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees within the meaning of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to its employee, Paul Helsley, whom it unlawfully discharged on January 13, 1994, immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings suffered as a result of its unlawful conduct in the manner set forth in the remedy section of this decision.

(b) Remove from Paul Helsley's personnel file and from any other file any reference to his January 13, 1994 termination as a voluntary quit.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Shirley, Indiana facility copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''